NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAMUEL GOMEZ ALCONTAR, Petitioner, vs. TOM L. CAREY, Warden, Respondent.	No. C 02-4628 PJH (PR) ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

This is a habeas corpus case filed pro se by a state prisoner pursuant to 28 U.S.C. § 2254. The court ordered respondent to show cause why the writ should not be granted. Respondent has filed an answer and a memorandum of points and authorities in support of it, and has lodged exhibits with the court. Petitioner has not filed an optional traverse. The matter is submitted.

BACKGROUND

After petitioner waived his rights to a jury trial, a Santa Clara court convicted him of making terrorist threats, see Cal. Penal Code § 422, and found him not guilty of failing to register as a sex offender, see Cal. Penal Code § 290(g)(2). The court found that he had been convicted of two prior "strike " offenses, but struck one in the interests of justice and sentenced defendant to six years in prison. The California Court of Appeal affirmed and the California Supreme Court denied review.

The following facts are summarized from the opinion of the California Court of Appeal. Ex. B at 2-3.

On the morning of the incident, Linda Gonzales took her three-year-old grandson to her car. She noticed defendant touching her neighbor at the bus stop in front of her

apartment. As the neighbor walked away, Gonzales saw petitioner touch the neighbor's breast. Then Gonzales saw petitioner instigate a fight with a man with a cane who was waiting for the bus. Gonzales asked petitioner to take the fight elsewhere because there was a child in the yard. The bus came and the man with the cane boarded it. Petitioner then told Gonzales not to call the police and threatened to burn down her home. Gonzales tried to shut the driveway gate and petitioner called her a bitch and yelled, "shutting the gate won't keep me out, because your house could be burned down to the ground." He raised his hands toward her, in front of her face. Gonzales noticed that he appeared to be under the influence of something. She was afraid and took the threats seriously.

A man and a woman waiting for the bus flagged down a police officer. The police officer talked to those people and Gonzales. All of the witnesses told him about the threats made by petitioner. The officer noticed that petitioner was intoxicated, belligerent and uncooperative. After petitioner tried to walk away, the officer handcuffed him and put him in the patrol car. Petitioner started violently kicking the car door and windows. The officer called a sergeant and petitioner settled down.

Petitioner was arrested on outstanding warrants, for failure to register as a sex offender, and for making threats. He was booked and had his blood drawn. It is undisputed that petitioner's blood alcohol level was .27.

Gonzales called the police department several times to see if petitioner had been released. She was afraid that he would act on his threats. Apparently her father had burned down their home when she was five and the petitioner's threats brought back old fears. She indicated to the responding officer that she was very afraid for her own and her family's safety.

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STANDARD OF REVIEW

The petition in this case was filed after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), so the provisions of that act apply to it. Lindh v. Murphy, 521 U.S. 320, 327 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499-1500 (9th Cir.), cert. denied, 522 U.S. 93 (1997) ("justice and judicial economy are better served by applying the Act to cases filed after the enactment date."). Under the AEDPA, a district court may not grant a petition challenging a state conviction or sentence on the basis of a claim that was reviewed on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). The first prong applies both to questions of law and to mixed questions of law and fact, Williams (Terry) v. Taylor, 529 U.S. 362, 407-09 (2001), while the second prong applies to decisions based on factual determinations, Miller-El v. Cockrell, 123 S. Ct. 1029, 1041 (2003).

A state court decision is “contrary to” Supreme Court authority, that is, falls under the first clause of § 2254(d)(1), only if “the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts.” Williams (Terry), 529 U.S. at 412-13. A state court decision is an “unreasonable application of” Supreme Court authority, falling under the second clause of § 2254(d)(1), if it correctly identifies the governing legal principle from the Supreme Court’s decisions but “unreasonably applies that principle to the facts of the prisoner’s case.” Id. at 413. The federal court on habeas review may not issue the writ “simply because that court concludes in its independent judgment that the relevant state-court decision applied

clearly established federal law erroneously or incorrectly." Id. at 411. Rather, the application must be "objectively unreasonable" to support granting the writ. Id. at 409.

When there is no reasoned opinion from the highest state court to consider the petitioner's claims, the court looks to the last reasoned opinion, in this case that of the California Court of Appeal. See Ylst v. Nunnemaker, 501 U.S. 797, 801-06 (1991); Shackleford v. Hubbard, 234 F.3d 1072, 1079, n. 2 (9th Cir.2000).

DISCUSSION

Petitioner contends that his due process rights were violated by admission of evidence that after he was arrested he became violent and kicked the door and window of the police car. He argues that the only possible inference that could be drawn from the evidence was the allegedly unconstitutional one that he had a propensity for violent conduct.

The California Court of Appeal rejected this claim, finding that the evidence went not only to propensity, but also to whether the threat was in fact intended to be taken as a threat and to whether the victim reasonably feared for her own safety and that of her family. Ex. B at 4-5.[1] Under California law, the fact-finder may consider events after the allegedly-threatening statements in determining whether a reasonable person would have considered the statements to be threats; that is, the evidence is not limited to the circumstances at the time the threats are uttered, but later events may render the earlier statements criminal. Id. at 4-6. In other words, the statements do have to be the sole

[1] Petitioner was convicted of violating section 422 of the California Penal Code, "Criminal Threats." The section reads, in relevant part: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison."

cause of the victim's fear; that fear may be created by a combination of the statements and later conduct. Id. at 6.

A state court's evidentiary ruling is not subject to federal habeas review unless the ruling violates federal law, either by infringing upon a specific federal constitutional or statutory provision or by depriving the defendant of the fundamentally fair trial guaranteed by due process. See Pulley v. Harris, 465 U.S. 37, 41 (1984); Jammal v. Van de Kamp, 926 F.2d 918, 919-20 (9th Cir. 1991). The due process inquiry is whether the admission of evidence was arbitrary or so prejudicial that it rendered the trial fundamentally unfair. Walters v. Maas, 45 F.3d 1355, 1357 (9th Cir. 1995). But only if there are no permissible inferences that the jury may draw from the evidence can its admission violate due process. Jammal, 926 F.2d at 920.

The appellate courts' holding here that the crime of "criminal threats" can be committed by uttering statements which are reasonably seen as threats only in light of subsequent events is a determination of California law which is binding on this court. See Hicks v. Feiock, 485 U.S. 624, 629 (1988). Therefore, the evidence of petitioner's conduct in the police car did not go only to propensity. The finder of fact could also draw a permissible inference from petitioner's post-statements actions, that the statements were intended as threats and that the victim was reasonably put in fear by them. Admission of the evidence therefore did not violate due process. See Jammal, 926 F.2d at 920 (no violation of due process if fact-finder can draw permissible inference from evidence).

In addition, even if it is assumed that the evidence went only to propensity, petitioner would not be entitled to relief because the United States Supreme Court has specifically left open the question of whether admission of propensity evidence violates due process. Estelle v. McGuire, 502 U.S. 62, 75 n. 5 (1991). There thus is no "clearly established Federal law, as determined by the Supreme Court of the United States," 28

U.S.C. § 2254(d), which could have been violated by admission of the prior crime evidence, and it is impossible for petitioner to show, as he must to obtain habeas relief, that the state appellate courts' rejection of his constitutional claim regarding admission of the evidence "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Id.

The trial court did not violate petitioner's due process rights, and the rejection of that claim by the state appellate courts was not contrary to, nor an unreasonable application of, clearly established United States Supreme Court precedent.

CONCLUSION

For the foregoing reasons, the petition for a writ of habeas corpus is DENIED. The clerk shall close the file.

IT IS SO ORDERED.

Dated: August 16, 2005.

PHYLLIS J. HAMILTON
United States District Judge

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